IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 554.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION.

MUTUAL BROADCASTING SYSTEM, INC.,

*Intervenor.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

## REPLY BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

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## REPLY BRIEF FOR APPELLANT NATIONAL BROADCASTING COMPANY, INC.

### I.

The absence of statutory support for the Order causes the Government to rely largely upon a restatement of the conclusions in the Report on Chain Broadcasting. The Government also attempts to persuade this Court that the Order is based upon a Report which is the equivalent of

administrative findings made upon a full and fair hearing such as to preclude a trial. This position of the Government should be contrasted with the contention made by it upon the previous appeal in this Court that the Regulations are nothing more than announcements of a licensing policy which can be tested only upon an additional record made before the Commission in individual licensing proceedings.

This attempt is disingenuous beyond the point to which lack of candor on the part of an administrative tribunal can be permitted to go. At the commencement of the investigation authorized representatives of the Commission stated that there were "no parties to this proceeding at all" and that the proceeding was not "a case that will be appealed anywhere" (p. 92, Appendix E to our main brief). On appeal the Government now attempts to use that investigation as if it had produced a record sufficient to preclude a trial on the merits. If this can be done, then the requirement of *Morgan* v. *United States*, 304 U. S. 1 (1938), that the administrative process must include the basic elements of fair play, is meaningless.

The Report is at most a collection of charges sufficient only to formulate a complaint. Throughout the brief the Government attempts to avoid that fact by making repeated assertions that there is no dispute or controversy with respect to any of the underlying facts (Br., pp. 40, 42, 52, 80, 131, 135, 137). Fundamental facts are very clearly in dispute.

But this is only part of the difficulty. The Commission has gone further and has openly stated that its Order is also based upon "conferences which followed the hear-

ings" and "testimony presented before the Senate Commitee on Interstate Commerce" (p. 97, Appendix E to appellant's main brief).

The Government now challenges appellants to specify what evidence they will wish to add to that already adduced in the course of the investigation. Appellants find themselves in the position either of ignoring that challenge in the Government's brief or of letting the challenge go by default. The challenge, of course, assumes the sufficiency of the hearings held pursuant to the Commission's investigation as far as those hearings went but it is this very assumption that the manner in which those hearings were held negates.

It is therefore true that appellants, without their day in Court, cannot effectively meet the picture painted by the Government in its brief upon the transcript of those hearings alone. The transcript does not contain the relevant facts and appellants' affidavits are directed only to the question of irreparable injury.

Unless and until there is a trial, appellants are bound by the four corners of the record in this Court, in spite of the fact that at the commencement of the investigation appellants were informed by the Commission that the case was not one that would be appealed anywhere. However, to demonstrate that there are vital matters which could and would be controverted were we given the opportunity to do so, appellants accept the challenge of the Government as to what appellants would prove upon a trial. As will be pointed out below in this brief, such evidence would not be solely directed to the prospective effect of the Regulations but would prove facts with respect to the actual past and present conduct of network broadcasting.

The conclusions in the Report on Chain Broadcasting are based upon four major fictions which we will now proceed to consider *seriatim*.

## 1.

## The Fiction of the Limitation of Facilities.

The Commission has licensed less than three stations in many of the cities of the United States. Upon this limitation of facilities has been built the fiction that cities having fewer than four stations are prevented from hearing programs of one or more of the existing national networks if each station for one reason or another chooses to take its programs from only o. ? of the networks. For example, the Government states (Br. 26-27):

> "In cities where there are fewer than four stations—the great majority of the cities—such clauses [prohibited by the Order] totally exclude the programs of one or more of the existing national networks."

The fiction is easily exposed. It assumes that a city receives radio service only from stations located in the particular city. Everyday experience shows, however, that a city receives radio programs not only from stations located therein but also from stations located elsewhere. Indeed, the limitation of the facilities in a given area is often brought about by the very fact that otherwise programs from stations located outside the area would interfere with programs from stations within the area.

The Government would have this Court believe that Blue Network programs such as the Metropolitan Opera

Lowell Thomas, Raymond Gram Swing, the Boston Symphony and the Town Meeting of the Air cannot be heard in any city other than one *in* which the Blue Network has an affiliate (Br. 27). The Blue Network does not have any station in Racine, Wisconsin, or South Bend, Indiana, yet to suppose that the citizens of those cities and of the metropolitan areas surrounding them are unable to receive these outstanding programs from Chicago where Blue does have a station, is absurd. The Commission's standards of good engineering practice prove such absurdity and the Government is amply aware that the cities of Racine, Wisconsin, and South Bend, Indiana, together with their surrounding areas, do receive Blue Network programs even though the Blue Network does not have any station in those cities.

Mutual Broadcasting System, Inc. (MBS) does not have any station located in the metropolitan area of Trenton, New Jersey. Yet to contend that MBS programs are *excluded* from that city is preposterous. The Government knows that station WOR in New York gives full and complete service in Trenton. Furthermore, with reference to the Government's challenge as to what appellants would prove at the trial, appellants would prove that WOR advertises that it covers the following 16 cities:

Bridgeport, Conn.
New Haven, Conn.
Trenton, N. J.
Newark, N. J.
Allentown, Pa.
Philadelphia, Pa.
New York, N. Y.
Jersey City, N. J.
Paterson, N. J.

Yonkers, N. Y.
Camden, N. J.
Elizabeth, N. J.
Reading, Pa.
Wilmington, Del.
Waterbury, Conn.
Hartford, Conn.

In spite of this MBS and the Government would have this Court believe that MBS programs are excluded from these cities except where it has an affiliate located therein. Five of the above cities are ones of which MBS complains (R. 339-343).

## 2.

## The Fiction of the "Domination" of the Air.

The Government's brief seeks to convey the impression that domination of the air exists through ownership by network organizations of many of the most desirable stations. The fact is that of 924 standard broadcast stations licensed in the United States only six, or approximately ½ of 1%, are licensed to NBC.

The next fiction used by the Government in attempting to prove dominance is the device of lumping NBC, CBS and the Blue together. This is done although the Report admits there is vigorous competition between the networks. By this manipulation the Government is able to cite the statistic that 85% of the nation's night-time wattage is licensed to or affiliated with these three networks. The thought sought to be conveyed thereby is that these three networks dominate 85% of the air. That is not the fact.

Answering the challenge of the Government as to what facts NBC would prove on a trial, one of the facts which NBC would show is that of the total population coverage of the 924 standard broadcast stations in the United States those on the NBC network have only approximately 15 to 18% of the total. Each of the four existing national networks has an approximately equal percentage of the total available population coverage by radio in the United States.

Moreover, as pointed out in our main brief, each station has ample time available for local purposes. The NBC option (except west of Denver) covers only 8½ hours of the broadcasting day consisting of 16 to 18 hours.

No charge of domination on the part of the network organizations can stand in the face of these facts.

3.

**The Fiction of Restrictions Upon the Growth of MBS.**

NBC commenced operations in 1926 with two networks, the Red and Blue. CBS commenced operations in 1927. MBS was not formed until 1934. Starting with a total of four stations, MBS became a national network in 1936 (R. 63). In 1940 MBS had expanded to a network of 160 stations (R. 63) and at the present time it comprises over 200 stations. MBS's total time sales have grown from $1,100,000 in 1935 (R. 64) to $9,636,122.49 in 1942.

Since 1936, when MBS attained the status of a nation-wide network, the contracts of affiliation between NBC and the licensees affiliated with it and the contracts of affiliation between CBS and the licensees affiliated with it, have, in practically every instance, expired and, consequently, from

1936 to the present time practically every standard broadcast station licensee in the United States has been available for affiliation with MBS (R. 370). That there has been competition in the network-station market is apparent from the fact that all four national networks have been entering into affiliation contracts with previously unaffiliated stations since 1936 and the fact that affiliates shift from time to time from one network organization to another (R. 370).

The choice of a station licensee is not restricted by the affiliation contracts, but is based solely upon the program and other service offered by the various network organizations competing for the opportunity to enter into or continue affiliation with the particular station licensee. The Commission can hardly complain that the program service offered by NBC, CBS or Blue is sufficient to attract affiliates even though that service be based upon longer experience and better reputation in the field.

Program service is made up of two factors: The amount and quality of commercial programs offered and the amount and quality of sustaining programs offered. Other network services include the assumption of wire line costs and the sale of station time to national advertisers. The Commission's Report itself shows that the MBS method of operation requires affiliates in most instances to assume the cost of the wire lines and that MBS does not itself supply a continuous schedule of sustaining programs (R. 75-76, 79, 234-235). Many stations are unwilling to assume the cost of the wire lines and prefer the method of the other three networks in the production and distribution of sustaining programs.

## 4.

### The Fiction of a Continuous Supply of Programs.

The Government would have the Court believe that the networks are in possession of a continuous supply of programs, only the distribution of which might be slightly inconvenienced by the abolition of option time. The Commission Report proceeds as though the four networks were four spigots from which any station could make a selection at will and by the mere act of turning on the spigot cause a continuous flow of programs to come forth. The fact is, as is pointed out in appellant's main brief, that there can be no such supply of programs without option time, for option time alone makes possible the economic support without which those programs could not be put on the air. No national network operates without option time.

Nor is the necessity merely one of rapid communication, the impression which the Government seeks to convey. Without the continuing certainty that the option is available and that requisite circulation can be delivered for nation-wide network broadcasting, the advertisers would not advertise by way of nation-wide network broadcasting.

The Commission attempts to brush aside the fact that option time is absolutely essential to network broadcasting, in spite of the fact that Regulation 3.104 is premised upon that very fact, by urging that it was adopted by NBC as a competitive measure rather than because of the practical exigencies of network broadcasting.

Some of the evidence which NBC would adduce to disprove this impugning of motive would be the testimony of the independent business research organization upon

whose advice NBC adopted option time in 1935 after suffering heavy disabilities through trying to operate without it. The *amicus* briefs of the American Association of Advertising Agencies and the Association of National Advertisers, make it apparent that this evidence will be firmly supported by the testimony of the advertisers themselves. This is a field in which the Commission has no expert knowledge or competence whatsoever.

Indeed, these *amicus* briefs clearly show that the effect of Regulation 3.104 will be disastrous to the present diversified system of network broadcasting, will benefit only the best stations and will result in a monopoly of national commercial programs in the best stations in each area, as described at pages 96 to 97 of appellant's main brief. To this the Government, even in argument, can only answer (Br. fn., p. 98) that the Commission will attempt to deal with the diastrous effects of the Order after they have occurred. Instead of merely attempting to regulate the network organizations, it is there proposed that the Commission should also regulate the advertisers.

Moreover, once the best stations in each area have obtained the lion's share of commercial programs, there is no probability that they would be willing to grant an option upon their time to a network organization or anyone else. In protecting against the effect of the Order, the Commission would then be compelled either to require those stations to grant an option to the network organizations or to require those stations to reject the programs of the advertisers, either one of which would not only interfere with the freedom of the station to exercise its own responsibility as to what it desired to broadcast but would also be a direct infringement of freedom of speech by radio.

## II.

In attempting to support the Order on the ground that it is reasonable, the Government points to the fact that appellants in this case address themselves primarily to Regulation 3.104. The Government even goes so far as to attempt to negative the fact that appellants would be irreparably injured if the Order were to become effective. This argument is advanced in spite of the fact that the District Court has found (R. 533) that appellants would be irreparably injured if the Order should become effective.*

The Government in its brief, in attempting to deny the disastrous effects which the Regulations will have on network broadcasting, again protests that the Order is merely an expression of licensing policy (Br., pp. 40, 77, 127). This contention stands uneasily beside the holding of this Court on the previous appeal that the Regulations require the Commission "to reject and authorize it to cancel licenses on the grounds specified in the Regulations without more."

It is true that *present* irreparable injury, in so far as NBC is concerned, arises primarily from Regulation 3.104. The NBC affiliation contracts do not contain some of the provisions at which some of the other regulations are directed. The irreparable injury which Regulation 3.107 would inflict has been postponed by an indefinite postponement by the Commission of that Regulation. Irreparable

* Since the prior appeal to this Court, appellants submitted an additional affidavit (R. 517) showing that the Commission minute involved in the prior appeal did not operate to mitigate the damage to NBC described in the affidavits submitted in support of appellants' motion for preliminary injunction.

injury, however, goes only to the jurisdiction of the courts to review the Order, which has been established by the previous decision of this Court, and to the question whether the Order is arbitrary and capricious even if within the orbit of the Commission's jurisdiction. This appeal, however, raises the far broader question of the validity of the power asserted by the Commission in promulgating the Order upon which all of the regulations depend.

The vast, undefinable and unrestricted power asserted by the Commission in support of the Order has been advanced by the Government in its brief in this Court. As in the court below, the Government here prefers to rely upon certain alleged "principles" which it purports to find in the statute rather than upon the specific statutory provisions themselves. The exegesis whereby the principles are evolved gains plausibility, however, solely from a posited need to meet the supposed evils in network broadcasting (which appellants deny and would disprove at the trial) and not from an appraisal of the statute itself. The statutory provisions upon which the alleged "principles" are based are discussed in our main brief and, as there pointed out, they do not support the power asserted.

In addition, the scope of the statutory standard of public interest, convenience or necessity as used in the Communications Act of 1934 is sought to be expanded and given meaning by reliance upon cases in the public utility field. See, *e.g.*, the use of *United States* v. *Lowden*, 308 U. S. 225; *Interstate Commerce Commission* v. *Railway Labor Executives Assn.*, 315 U. S. 373 and *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, at pages 61 to 63 of the Government's Brief, each of which defines the term "public inter-

est'' in an entirely different context wholly irrelevant to the Communications Act of 1934.

The Government relies in support of the Commission's power to promulgate general regulations governing its licensing function upon *Securities and Exchange Commission* v. *Chenery Corporation*, decided February 1, 1943 (Government Brief, p. 77): This case arose under the Public Utilities Holding Company Act of 1935, a statute vesting the SEC with far more comprehensive powers for far different purposes than those of the Federal Communications Commission under the Communications Act of 1934.

The Government also relies upon the fact that the Communications Act of 1934 makes each licensee responsible for the operation of its station and requires the consent of the Commission to a transfer of the license. There is no valid relation, however, between these statutory requirements and the Order. This is made fully apparent by the fact that the Commission protests that the Order, while banning options, permits the outright sale of any amount of time to a network organization. Both the Commission and the Government recognize the necessity for network broadcasting and the corollary necessity for the delegation of the production of programs. No individual station licensee can conduct network broadcasting and create all of its programs and these functions must be performed by others.

Finally, the Government attempts to make appellants' argument limit the Commission solely to physical matters. Such is not their argument. Certain other matters must inevitably go along with the necessity to license stations in

order to prevent interference. Most of these are discussed in our main brief and include the equitable geographical distribution of available facilities, the distribution of facilities among applicants, and an appraisal of the character and ability of the licensee. All of these matters, however, are specified in the statute itself.

Appellants wish here to point out that they have not raised the grave and important issue of freedom of speech by radio as a shield against regulatory powers fairly to be found in the provisions of the Act. The Government, the Commission and the District Court agree with appellants' contention that the Order itself represents a direct interference with the freedom of speech by radio. This, however, is only part of the infirmity to which the Order is subject under the First Amendment. The extreme scope of the power asserted by the Order and the vague and undefined language to which its proponents have been compelled to resort in order to support the asserted power have raised in a manner which cannot be avoided the broader issue as to whether freedom of speech by radio can continue to exist under a licensing authority so undefined in scope.

Respectfully submitted,

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